A

LEE KWAI HEONG & ANOR

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
RICHARD MALANJUM JCA
AUGUSTINE PAUL JCA
HASHIM YUSOFF JCA
[CRIMINAL APPEAL NO: J-05-52-2003 & J-05-53-2003]
C 11 JANUARY 2006

CRIMINAL PROCEDURE: *Appeal - Fact, finding of - Power of appellate court to reverse finding of fact - Whether appellate tribunal will generally defer to conclusion of trial judge formed based on trustworthiness*
D *of witnesses - Circumstances where the appellate tribunal will reverse finding of fact*

CRIMINAL PROCEDURE: *Defence - Alibi - Evidence supporting alibi*

E ***CRIMINAL PROCEDURE:*** *Summing up - Common intention - Crucial ingredient to prove common intention - Whether pre-concert or pre-planning must precede offence*

CRIMINAL PROCEDURE: *Prosecution - Prosecution's case - Bare*
F *denial, evidence of - Whether bare denial raised reasonable doubt in prosecution's case*

EVIDENCE: *Documentary evidence - First information report - Whether first information report substantive piece of evidence - Evidential*
G *value of first information report*

EVIDENCE: *Information leading to fact discovered - Evidence Act 1950, s. 27 - Whether trial judge has discretion to exclude evidence prejudicial to accused even though evidence technically admissible - Whether evidence obtained in oppressive manner by force or by trick*
H *should be rejected*

On 8 October 1998 at about 6.45am, a police report (exh. P24) was lodged by one Lee Cheng Soi ('PW7') on an incident where at about 4am on the same day one Sanip Leham ('the deceased')
I was attacked by several persons at Lombong Jomis KM 4 Jalan Sungai Rengit, Kota Tinggi, Johore. The attack caused the death of the deceased. Initial Police investigation led to the arrest of

several persons including PW7. On 21 October 1998 the first appellant was arrested in connection with the offence while the second appellant was arrested on 14 November 1998. Subsequently, the two appellants were charged for the murder of the deceased. The appellants claimed trial. The first appellant premised his defence on his alibi and he gave notice as required under s. 408A of the Criminal Procedure Code. The second appellant rested his defence on bare denial having failed to give the requisite notice for the defence of alibi.

The learned High Court Judge, having considered the evidence adduced by the Prosecution found that a *prima facie* case was made out and thus called upon the appellants to enter their respective defence. At the conclusion of the trial and having considered the case as a whole the learned judge found both the appellants guilty as charged. In coming to his decision the learned judge, *inter alia*, made the following findings: (i) that the contradiction in the evidence of PW7 elicited while under cross examination did not affect his testimony; (ii) that omissions in exh. P24 were excusable as it was only a first information report and that the explanation by PW7 for his failure to mention the names of the appellants in his police report (exh. P24), (that is, the fear that the children of the deceased might go after the appellants), was acceptable and not inherently incredible; (iii) that the common intention of the appellants in the commission of the offence could be inferred from the evidence that PW7 saw them chasing the deceased while holding something which resembled exh. P9(a) and the discovery of the torch light exh. P19(a) and the waist pouch exh. P18(a) belonging to the deceased; (iv) that the bare denial by the second appellant being in the vicinity of the crime scene at the material time without any supporting evidence did not create any reasonable doubt in the prosecution's case; (v) that on the totality of the evidence adduced, including the evidence of PW7 and the alibi evidence for the first appellant, it could not be accepted that at the time of the incident the first appellant was asleep at Kg. Perpaduan Skudai. Hence the alibi of the first appellant could not be accepted and for that reason the first appellant failed to cast any reasonable doubt in the prosecution's case; and (vi) that on the totality of the evidence adduced by both the prosecution and the defence the learned judge found that 'the prosecution has succeeded in proving the charge against both the accused beyond any reasonable doubt'. Both appellants

were therefore found guilty of the offence as per charge under s. 302 read with s. 34 of the Penal Code and accordingly both were sentenced to death by hanging.

The appellants appealed on the following grounds: (i) the cause of the death of the deceased; (ii) the discovery of the items by PW10 and the admission thereof pursuant to s. 27 of the Evidence Act 1950; (iii) proof of common intention; (iv) the importance of the first information report in the present appeals; and (v) the defence of alibi in respect of the first appellant and the defence of the second appellant.

Learned counsel for the appellants submitted that the death of the deceased was not caused by the appellants. He argued that the evidence presented by the prosecution linking the appellants to the death of the deceased was primarily based on the testimony of PW7 whose evidence should not have been admitted or believed by the learned trial judge. It was pointed out by counsel that there were discrepancies in PW7's evidence particularly on the contents of his police report (exh. P24) lodged soon after the incident and his testimony during the trial. In his report PW7 did not mention the names of the appellants or the presence of any motor cycle. PW7 had therefore two versions of the incident and that under cross-examination PW7 was inconsistent in his answer to the question of whether the contents of his police report were correct or not. Learned counsel for the appellants further submitted that in invoking s. 27 of the Evidence Act to admit exh. P33 and exh. P34 together with exh. P19(a) and exh. P18(a) torch light and a waist pouch belonging to the deceased) the learned trial judge failed to appreciate that the defence's objections were premised on: (a) that the first appellant never made the alleged information in exh P33; and (b) in any event, the alleged information was not voluntarily extracted. Learned counsel also highlighted the content of exh D28 which was the station diary entry made on 23 October 1998 in respect of the first appellant wherein it was recorded that there were bruises on his chest and abdomen areas soon after he was returned to the lockup after his interrogation. Learned counsel submitted that it was wrong for the learned trial judge to find that common intention was established when the evidence of PW7 should not have been believed due to its poor quality. It was submitted that the recovery of exh. P18(a) and exh. P19(a) could not support the element of common intention since there was also no credible evidence relating to the information under s. 27 of the Evidence Act. Learned counsel for

the appellants also submitted that the alibi of the first appellant was reasonable and legitimate which should have cast reasonable doubt to the case for the prosecution.

Held (dismissing both the appeals against the respective convictions and sentences)
Per Richard Malanjum JCA:

(1) It is settled law that a first information report is not a substantive piece of evidence. Its evidential value 'is only to contradict the testimony of a witness under s. 145 of the Evidence Act 1950 or to corroborate his testimony under s. 157 of the said Act. It is not substantive evidence of its contents but merely of corroborative value'. As such it would not be in accordance with the settled principle if the evidence of PW7 in Court should be considered unreliable by reason of him failing to include the names of the appellants when he lodged exh. P24. Accordingly, the question of invoking ss. 91 and 92 of the Evidence Act 1950 should not arise. (paras 13 & 15)

(2) It is a settled principle of law that where the judge at the trial has come to a conclusion upon the question which of the witnesses, whom he has seen and heard, are trustworthy and which are not, he is normally in a better position to judge of this matter than the appellate tribunal can be; and the appellate tribunal will generally defer to the conclusion which the trial judge has formed and if an appeal is from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, an appellate court must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong. (para 16)

(3) In order to be convinced that the decision of a trial judge is wrong an appellate court has a duty 'to check by critical examination of the whole of the evidence the trial judge's conclusion as to the truthfulness of that witness'. Some of the matters to consider are: whether the witness's story is inherently 'consistent with the facts and circumstances alleged therein' and which may gain weight by other factors; 'corroboration by other witnesses will strengthen it; credible extrinsic circumstantial evidence will do the same; and lastly

A the demeanour and tone in which the witness gives evidence will add to fortify (if favourable) the inherent probability of the story but the last named is the least weighty element in the credibility of a story'. (para 16)

B **(4)** In the instant appeal, the learned trial judge did examine the evidence of PW7 and applied the correct judicially accepted test. In relation to the discrepancies in the testimony of PW7 in relation to exh. P24, the explanation given was not inherently incredible as to warrant a complete rejection of
C the evidence of PW7. The explanation given by PW7 for not mentioning the appellants in his police report answered the contention. In any event there was no reason for PW7 to specifically mention the appellants if the sole purpose was for self-preservation. (paras 18 & 20)

D **(5)** In relation to admission of information under s. 27 it is a matter of discretion for the trial judge to exclude evidence which is prejudicial to an accused even though the said evidence may be technically admissible. Evidence obtained in
E an oppressive manner by force or against the wishes of an accused person or by trick or by conduct of which the police ought not to take advantage, would operate unfairly against the accused and should in the discretion of the court be rejected for admission. (para 30)

F **(6)** In the present appeals, at most the defence only denied that the appellants gave the information to PW10 who maintained in his testimony that they did. The learned trial judge accepted the evidence of PW10. Further, there was hardly any evidence adduced to indicate that admitting the
G information would operate unfairly and prejudicial to the appellants in which the trial judge would have been obliged to exercise his discretion to exclude such information. (para 31)

H **(7)** As regards the assertion that the first appellant was assaulted and had bruises, the evidence as recorded did not indicate that the information was extracted under such circumstances so as to warrant the learned trial judge to exercise his discretion. There was no evidence adduced to indicate that
I the bruises on the chest and abdomen of the first appellant were the result of assault by the police during interrogation. (para 32)

(8) The crucial ingredient to prove common intention is the existence of pre-concert or pre-planning which may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Bearing in mind the test and that common intention being a question of fact, there was no misdirection by the learned trial judge. (paras 36 & 37)

(9) The defence of alibi of the first appellant should be rejected. As found by the trial judge none of the evidence of the witnesses called to support the alibi of the first appellant came close to account for the movement of the first appellant after the mahjong session ended at midnight on 7 October 1998. (para 39)

(10) The evidence of the second appellant was nothing more than a bare denial of his involvement in the commission of the offence. And in the process of making his denial the second appellant contradicted the evidence of some of the witnesses called by the first appellant and the prosecution. Thus there was no basis to say that the bare denial by the second appellant had raised reasonable doubt in the prosecution's case. (paras 41 & 43)

(11) The defence had not raised any reasonable doubt in the prosecution's case and that the prosecution had proved its case beyond reasonable doubt that the appellants were guilty as per charge. (para 44)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Goi Ching Ang v. PP [1999] 1 CLJ 829 FC ***(refd)***
Herchun Singh v. PP [1969] 2 MLJ 209 ***(refd)***
Sabarudin Non & Ors v. PP [2005] 1 CLJ 466 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 408A
Evidence Act 1950, ss. 24, 27, 91, 92, 145, 157

For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent/prosecution - Abd Wahab Mohamed DPP

[Appeal from High Court, Johor Bahru; Criminal Appeal No: 45-11-1998]

Reported by Amutha Suppayah

JUDGMENT

Richard Malanjum JCA:

[1] There were two appeals before us heard jointly with the consent of the parties.

[2] On 12 August 2005 we dismissed both appeals having reserved our decision after hearing the submissions from learned counsel for the appellants and the learned Deputy Public Prosecutor. We upheld the convictions and sentences imposed upon both the appellants by the High Court at Johore Baru. We indicated that we would give our reasons later. We do so now.

[3] The charge preferred against both the appellants reads as follows:

> Bahawa kamu bersama-sama dua orang yang bebas pada 08hb. Oktober 1998 lebih kurang 4.00 pagi di bekas Lombong Jomis KM 4, Jalan Sungai Rengit, dalam daerah Kota Tinggi di dalam Negeri Johor telah melakukan pembunuhan dengan menyebabkan kematian *Sanip bin Leham* (No. K/P: 2250576) dan oleh yang demikian telah melakukan satu keaslahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan dan dibaca bersama Seksyen 34 Kanun yang sama.

(Translation:

> That you together with two other persons still at large on 08th October 1998 around 4.00 am in the morning at the former Lombong Jomis KM 4, Jalan Sungai Rengit, in the district of Kota Tinggi in the State of Johor committed murder by causing the death of Sanip bin Leham (No. K/P: 2250576) and hence committed an offence punishable under Section 302 Penal Code read with Section 34 of the same Code).

[4] Briefly the case for the Prosecution is that in the early morning of 8 October 1998 at about 6.45am a police report (exh. P24) was lodged by one Lee Cheng Soi @ Hassan bin Abdullah ('PW7') on an incident where at about 4am on the same day one Sanip bin Leham ('the deceased') was attacked by several persons at Lombong Jomis KM 4 Jalan Sungai Rengit, Kota Tinggi, Johore.

[5] The attack caused the death of the deceased. Initial Police investigation led to the arrest of several persons including PW7.

[6] On 21 October 1998 the first appellant was arrested in connection with the offence while the second appellant was arrested on 14 November 1998. Subsequently, the two appellants were charged for the murder of the deceased.

[7] The appellants claimed trial. The first appellant premised his defence on his alibi and he gave notice as required under s. 408A of the Criminal Procedure Code. The second appellant rested his defence on bare denial having failed to give the requisite notice for the defence of alibi.

[8] The learned High Court Judge, having considered the evidence adduced by the Prosecution found that a prima facie case was made out and thus called upon the appellants to enter their respective defence. And at the conclusion of the trial and having considered the case as a whole the learned judge found both the appellants guilty as charged. In coming to his decision the learned judge made the following findings:

i. that the evidence relied upon by the prosecution were both direct and circumstantial;

ii. that at the close of the case for the prosecution he was satisfied that there were credible evidence which proved all the ingredients of the offence as per charge;

iii. that despite the challenge by the defence on the credibility of PW7 as an eye witness, he accepted his evidence and found him to be a witness of truth who had positively identified both the appellants as amongst the assailants of the deceased that morning. PW7 had testified that there was moonlight which enabled him to witness the attack of the deceased;

iv. that the contradiction in the evidence of PW7 elicited while under cross examination did not affect his testimony that the appellants together with two others who were still at large chased the deceased while armed with a piece of wood or something which resembled a piece of wood;

v. that the evidence of PW7 that there was moonlight that morning was corroborated by Sjn/Mejar Harun bin Salleh ('PW9') who came to the scene of the crime after exh. P24 was lodged;

A vi. that the discrepancies or deficiencies in exh P24 *vis-à-vis* the evidence of PW7 during the trial were insufficient to demolish the evidence of PW7 on his identification of the appellants;

vii. that omissions in exh P24 were excusable as it was only a
B first information report;

viii. that the explanation by PW7 for his failure to mention the names of the appellants in his police report (exh. P24), (that is, the fear that the children of the deceased might go after
C the appellants), was acceptable and not inherently incredible;

ix. that the cumulative effect of the circumstantial evidence adduced through the chemist Mohd Jamadi bin Md. Jidi ('PW1'), the pathologist Dr. Shahidan bin Md. Noor ('PW4') and one Razanizam bin Borhan ('PW6') irresistibly indicated
D the guilt of the appellants;

x. that it was the evidence of PW6 that he had previously worked for the first appellant at Lombong Jomis. And while collecting his shoes the first appellant told him that he
E wanted to 'belasah' the deceased;

xi. that the injuries sustained by the deceased and as found by PW4 proved the element of intention to cause death;

xii. that the finding of traces of blood of type belonging to the
F deceased on a piece of wood, exh. P9(a), by PW1 was consistent with the view of PW4 that the injuries on the deceased could have been caused with a piece of wood;

xiii. that the discovery of the torch light (exh. P19(a)) and the
G waist pouch (exh. P18(a)) both belonging to the deceased as a result of the information given by the appellants to ASP Wan Hassan bin Wan Ahmad ('PW10') provided further pertinent evidence on the commission of the offence and these were admissible under s. 27 of the Evidence Act 1950;

H xiv. that the common intention of the appellants in the commission of the offence could be inferred from the evidence that PW7 saw them chasing the deceased while holding something which resembled exh. P9(a) and the discovery of the torch light exh. P19(a) and the waist pouch
I exh. P18(a) belonging to the deceased;

xv. that the bare denial by the second appellant being in the vicinity of the crime scene at the material time without any supporting evidence did not create any reasonable doubt in the prosecution's case;

xvi. that the denial by the second appellant was further weakened by the other evidence adduced. His denial of not knowing the house of the first appellant was contradicted by the evidence of Goh Siew Luan ('DW4'), the wife of the first appellant who said that the second appellant had come to her sister-in-law's house where the first appellant was staying to visit and play mahjong. And his version of only one visit to the place of work of the first appellant was also demolished by the evidence of PW7 who said that he saw the second appellant coming to the place several times;

xvii. that the testimonies of the witnesses for the Defence, including that of the first appellant, were riddled with inconsistencies. For instance the first appellant said that he played mahjong from 7 October 1998 until 1am on 8 October 1998 while the evidence of Puan Chong Kim Fah ('DW2'), Goh Siew Luan ('DW4') and Lee Kwai Eng ('DW5') disclosed that the mahjong session ended at 12 midnight on 7 October 1998;

xviii. that on the evidence adduced the movement of the first appellant from the midnight of 7 October 1998 was not known to the other witnesses called by the first appellant;

xix. that the distance between Kg. Perpaduan, Skudai where the first appellant was staying at that time to the place of incident was about 110 kilometers and the traveling time was slightly over one hour. The offence happened at about 4am;

xx. that on the totality of the evidence adduced, including the evidence of PW7 and the alibi evidence for the first appellant, it could not be accepted that at the time of the incident the first appellant was asleep at Kg. Perpaduan Skudai. Hence the alibi of the first appellant could not be accepted and for that reason the first appellant failed to cast any reasonable doubt in the prosecution's case; and

xxi. that on the totality of the evidence adduced by both the prosecution and the defence the learned judge found that 'the prosecution has succeeded in proving the charge against

A both the accused beyond any reasonable doubt'. Both appellants were therefore found guilty of the offence as per charge under s. 302 read with s. 34 of the Penal Code and accordingly both were sentenced to death by hanging.

B **[9]** Dissatisfied with the decision and findings of the learned judge in the High Court the appellants appealed to this court on several grounds. However before us learned counsel for the appellants summarized the grounds of appeal as follows:

C i. the cause of the death of the deceased;

ii. the discovery of the items by PW10 and the admission thereof pursuant to s. 27 of the Evidence Act 1950;

iii. proof of common intention;

D iv. the importance of the first information report in the present appeals; and

v. the defence of alibi in respect of the first appellant and the defence of the second appellant.

E **Issues i and iv**

The Cause Of The Death Of The Deceased And The Importance Of The First Information Report

F **[10]** It was the submission of learned counsel for the appellants that the death of the deceased was not caused by the appellants. He argued that the evidence presented by the prosecution linking the appellants to the death of the deceased was primarily based on the testimony of PW7 whose evidence should not have been G admitted or believed by the learned trial judge. Learned counsel said that in this case the learned trial judge failed to properly scrutinize the evidence of PW7 before admitting it. If that had been done the appellants would have been acquitted.

H **[11]** Obviously the thrust of the argument in these appeals was on the credibility and reliability of PW7 as a witness. Learned counsel for the appellants submitted that the evidence of PW7 should have been rejected or given little weight. To substantiate his contention learned counsel gave the following reasons, *inter* I *alia:*

i. there were discrepancies in his evidence particularly on the contents of his police report (exh. P24) lodged soon after the incident and his testimony during the trial. In his report PW7 did not mention the names of the appellants or the presence of any motor cycle. PW7 had therefore two versions of the incident;

ii. under cross-examination PW7 was inconsistent in his answer to the question of whether the contents of his police report were correct or not;

iii. the allegation against the appellants only surfaced after PW7 was arrested and detained for 14 days in the same lock-up with PW6 and one Goh Kim Hui who was not called as a witness. He had therefore the motive when implicating the appellants of the crime; and

iv. PW7 lied on the period of his detention in that he said he was detained for only six days when in fact he was remanded for 14 days.

[12] The learned deputy in his reply supported the finding of the trial judge that the discrepancies as found in the police report of PW7 and his testimony during the trial were minor. And he went on to submit that the first information report should not be elevated to a status beyond reproach and that the omissions therein should not be a reason to find PW7 as an unreliable witness. He cited the case of *Herchun Singh v. Public Prosecutor* [1969] 2 MLJ 209 to support his argument. However, the learned deputy was unable to give any specific answer to the question of why PW7 did not identify the perpetrator or perpetrators soon after he was detained.

[13] Now, it is settled law that a first information report is not a substantive piece of evidence. Its evidential value 'is only to contradict the testimony of a witness under s. 145 of the Evidence Act 1950 or to corroborate his testimony under s. 157 of the said Act the operation of which is as explained in *Lim Guan Eng v. PP* [2000] 2 MLJ 577. It is not substantive evidence of its contents but merely of corroborative value'. (See: *Balachandran v. Public Prosecutor* [2005] 2 MLJ 301). As such it would not be in accordance with the settled principle if the evidence of PW7 in court should be considered unreliable by reason of him failing to include the names of the appellants when he lodged exh. P24.

[14] As to the effect of omission in a first information report the then Federal Court in *Herchun Singh v. Public Prosecutor (supra)* spelt out the answer in this fashion at p. 211:

> As regards omissions in the first information report, we would endorse Sohoni's commentary on s. 154 of the *Indian Criminal Procedure Code* (16th Ed, Vol I, p 750); which is similar to s. 107 of our Criminal Procedure Code, as follows:
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> > It is a mistake to believe that a person cannot be the accused unless his name appears in the first information report. The provisions of the Code lay down no such stipulation. All that is required for purpose of this section is that there should be clear, definite information about the commission of a cognizable offence to set the investigation machinery in motion. Further, the information required need not contain the circumstances of the commission of the offence, nor the names of the offenders or the witnesses, for the main purpose of investigation is to ascertain these matters ... The first information report is not an Encyclopaedia. It is not the beginning and ending of every case. It is only a complaint to set the affairs of law and order in motion. It is only at the investigation stage that all the details can be gathered and filled up. But it cannot be said that omissions in the first information report would always be of no significance. The report is not substantive evidence and omissions in it will not ipso facto lead to the case being thrown out. But it is a piece of corroborative evidence; omissions in it will, other things being the same, deprive the prosecution of the most valuable corroboration and thereby make the story suspicious.
> >
> > When a first information report contains an omission as to an important fact relied upon by the prosecution, the omission is important and in the absence of any other evidence, the court may in a given case refuse to consider the evidence of the informant on that fact because of such omission. For a correct appraisal of the effect of omission as contradicting the informant it is essential to keep in view the circumstances in which the report was lodged.
> >
> > For instance, an omission in a report hurriedly lodged under the press of events should not have the same significance as one in a report lodged after cool calculation.

In short, it is wrong to hold up the first information report as a sure touchstone by which the compainant's credit may invariably be impeached. It can only be used for that purpose with

discrimination, in much the same way as previous statements by the witness are used, so that irrelevant errors in detail are not given exaggerated importance, nor omissions, objectively considered in the light of surrounding circumstances.

[15] Accordingly the question of invoking ss. 91 and 92 of the Evidence Act 1950 should not arise. Hence we find no merit in the submission of learned counsel for the appellants on this point.

[16] In respect of the contention that the learned trial judge erred in his assessment of the evidence of PW7 and accepting him as a witness of truth, with respect, we are of the view that it is a settled principle of law that 'where the judge at the trial has come to a conclusion upon the question which of the witnesses, whom he has seen and heard, are trustworthy and which are not, he is normally in a better position to judge of this matter than the appellate tribunal can be; and the appellate tribunal will generally defer to the conclusion which the trial Judge has formed' and if an appeal is 'from the decision of a trial Judge based on his opinion of the trustworthiness of witnesses whom he has seen,' an appellate court 'must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong'. (See: *Powell and Wife v. Streatham Manor Nursing Home* [1935] AC 243; *AD Caldeira v. FA Gray* [1936] MLJ 137 PC; *Loh Shak Mow v. Public Prosecutor* [1987] 1 MLJ 362 (also [1986] SLR 358). And in order to be convinced that the decision of a trial judge is wrong an appellate court has a duty 'to check by critical examination of the whole of the evidence the trial judge's conclusion as to the truthfulness of that witness'. Some of the matters to consider are:

i. whether the witness's story is inherently 'consistent with the facts and circumstances alleged therein' and which may gain weight by other factors;

ii. 'corroboration by other witnesses will strengthen it;

iii. credible extrinsic circumstantial evidence will do the same; and

iv. lastly the demeanour and tone in which the witness gives evidence will add to fortify (if favourable) the inherent probability of the story but the last named is the least weighty element in the credibility of a story'. (See: *Abraham Ho Ah Loke v. William Manson-Hing* [1949] MLJ 37).

[17] Recently this court in *Sabarudin bin Non & Ors v. Public Prosecutor* [2005] 1 CLJ 466 also addressed the issue of assessing the evidence and credibility of a witness.

> Based on the submissions of counsel before us the question is whether the learned judge properly evaluated PW34's evidence. In holding PW34 to be a credible witness the learned judge took into account the whole of that witness' evidence and tested it against the probabilities of the case. We find this approach to accord with the general principles that courts have laid down for themselves in the judicial appreciation of oral evidence. Thus, in *Tengku Mahmood v. Public Prosecutor* [1974] 1 MLJ 110 where Raja Azlan Shah FJ said that:
>
> > a judge of fact should always test the complainant's evidence against the totality of his evidence and the probabilities of the case. Failure to do so does amount, in my view, to a misdirection …
>
> On the methodology of assessing a witness' evidence we can do no better than to cite the following passage from *Sarkar on Evidence* (15th ed) p. 99:
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> > The Act does not purport to lay down any rule as to the weight to be attached to the evidence when admitted, nor is any such rule possible for the proper appreciation of evidence is a matter of experience, common sense and knowledge of human affairs. 'For weighing evidence and drawing inferences from it, there can be no canon. Each case presents its own peculiarities, and common sense and shrewdness must be brought to bear upon the facts elicited in every case which a judge of facts in this country discharging the functions of a jury in England, has to weigh and decide' (per Birch J in *R v. Madhub* 21 WR Cr 13, 19; *Mahendrapal v. State* AIR [1955] A 238 …
> >
> > Neither the Evidence Act nor any other Act lays down any law governing the question which statement of a witness should be believed or should not be believed. The question depends upon so many circumstances that it is impossible to lay down hard and fast rules. The law has left it to the court to decide whether the evidence should be believed or not and, if believed, what weight should be attached to it or what effect should be given to it. These matters have been left at the sound discretion of the court. When the Legislature itself has left them at the discretion of the court, it is not open to the highest court to fetter the discretion

by laying down hard and fast rules, because it would be tantamount to legislating (*Jwala v. State*, AIR [1963] All 161 FB). (Per Gopal Sri Ram, JCA at page 45).

[18] In the instance appeal we have carefully examined the reasoning by the learned trial judge *vis-à-vis* the evidence as recorded. We are unable to find any ground to agree with the submission of learned counsel for the appellants that the evidence of PW7 should be rejected in toto. On the contrary, we are of the view that the learned trial judge did examine the evidence of PW7 and applied the correct judicially accepted test. Discrepancies are there in the testimony of PW7 in relation to exh. P24. One discrepancy highlighted was whether the second appellant was armed when PW7 allegedly saw him chasing the deceased. From the evidence recorded PW7 corrected himself in re-examination that the second appellant was not armed. Thus, nothing turns on this point. In any event we are in agreement with the learned trial judge that the explanation given is not inherently incredible as to warrant a complete rejection of the evidence of PW7. Hence, we have no basis to say that there was no or insufficient judicial appreciation of the evidence of PW7 by the learned trial judge so as to warrant the reversal of his decision.

[19] Learned counsel for the appellants also raised the probable motive of self-preservation on the part of PW7 in naming the appellants as the assailants of the deceased. It was emphasized that it was only after PW7 was remanded together with PW6 and another person that he gave the names of the appellants to the police. The appellants were not mentioned soon after PW7 was remanded.

[20] We were not persuaded by this argument. The explanation given by PW7 for not mentioning the appellants in his police report should answer the contention. In any event there was no reason for PW7 to specifically mention the appellants if the sole purpose was for self-preservation. Surely he could have implicated anyone else unless he had other motive in framing up the appellants. But there is nothing on record.

[21] It was also the submission of learned counsel for the appellants that there was no circumstantial evidence implicating the appellants to the offence. Learned counsel contended that the evidence of PW1 (the chemist) and PW4 (the pathologist) did not incriminate the appellants. In respect of the evidence of PW6 (Rozanizam Borhan) learned counsel submitted that the trial judge

failed to appreciate that his evidence at most was based on suspicion and mere allegation which was challenged and that PW6 provided no reason why the first appellant would want to beat up the deceased.

[22] On the criticism of the evidence of PW1 and PW4 we are of the view that it has no merit. These witnesses are formal witnesses providing respectively the scientific findings of what were found smeared on the wood which was recovered from the scene of the crime and the probable manner in which the injury was inflicted upon the deceased which caused his death. And the findings were consistent with and supportive of the other evidence adduced by the Prosecution, in particular the evidence of the eye witness, PW7. In that sense the evidence of PW1 and PW4 formed the circumstantial evidence in this case.

[23] In respect of the testimony of PW6 the learned trial judge merely alluded to it in passing and we did not find that he substantially relied on it in coming to his decision. We would say that even ignoring the evidence of PW6 there were other materials upon which the learned trial judge could come to his findings. We find no reason to say that the appellants were seriously prejudiced by the inclusion of the evidence of PW6.

[24] We note that except for the criticism on the truthfulness of the evidence of PW7 there was no specific issue raised on the recognition or identification of the appellants by PW7.

[25] Accordingly, we find no merit in the two issues as raised for the appellants.

Issue ii:

The Discovery Of The Items By PW10 Pursuant To s. 27 Of The Evidence Act

[26] Learned counsel for the appellants submitted that in invoking s. 27 of the Evidence Act to admit exh. P33 and exh. P34 together with exh. P19(a) and exh. P18(a) (a touch light and a waist pouch belonging to the deceased) the learned trial judge failed to appreciate that the defence's objections were premised on:

(a) that the first appellant never made those alleged information in exh P33; and

(b) in any event, the alleged information was not voluntarily extracted.

According to learned counsel there was no finding made by the learned trial judge on those objections thus to the prejudice of the appellants. It was further raised in respect of the second appellant that there was doubt in the alleged information since it was not ascertained the language used by him when giving such information.

[27] Learned counsel also highlighted the content of exh. D28 which was the station diary entry No. 7235 made on 23 October 1998 in respect of the first appellant wherein it was recorded that there were bruises on his chest and abdomen areas soon after he was returned to the lockup after his interrogation.

[28] In reply the learned deputy said that the admission was correct. He argued that there was no necessity to conduct a trial within trial to ascertain the admissibility of the relevant exhibits under s. 27 of the Evidence Act.

[29] It is now settled that s. 27 thereof should not be equated to s. 24 which deals with admission of confession. In the case of *Goi Ching Ang v. Public Prosecutor* [1999] 1 CLJ 829 our Federal Court said this in relation to the application of s. 27 at p. 850:

> It will thus be seen from the judicial pronouncements that the independence and distinctiveness of s. 27 of the Evidence Act 1950 and its being regarded as an exception to s. 24 thereof are deeply rooted in our case law, and so far as we are aware, has stood unchallenged for decades.
>
> Next, having regard to the wordings of ss. 24 and 27, there is, purely by reason of the language of the two sections alone, no nexus necessitating a determination as to whether one section is subject to or exception to the other. To illustrate, s. 25 of the Evidence Act 1950 prohibits (subject to certain exceptions which are of no relevance for our purpose) the use of a confession made to a police officer below the rank of Inspector and s. 26 disallows proof of a confession made by a person in the custody of a police officer whereas s. 27 permits proof of information, be it amounting to a confession or otherwise, given by an accused in the custody of a police officer. There clearly is a necessity to

A determine the independent nature or otherwise of s. 27 as against ss. 25 and 26. The same, however, cannot be said of s. 27 in relation to s. 24. Section 27 is silent as to or bears no ligature to the voluntary nature or otherwise of the information. The words 'whether the information amounts to a confession or not' in s. 27 relates merely to the character of the information, ie whether it is a confession, or a statement falling short of a confession. In other words, unlike s. 27 when compared with ss. 25 or 26 of the Evidence Act 1950, a comparison of s. 27 and s. 24 does not show that they contain any words or phrases bearing or capable of bearing any reference to one another. From the wordings in the two sections, they stand independently of each other.

Furthermore, if s. 27 were held subject to s. 24, then, logically, it would also be held to be subject to other provisions to the like effect or of similar nature as the said s. 24 contained in other enactments, eg, s. 113 of the Criminal Procedure Code, s. 37A of the Dangerous Drugs Act 1952, s. 75 of the Internal Security Act 1960, s. 15 of the Prevention of Corruption Act 1961 (repealed with effect from 8 January 1998), s. 45 of the Anti-Corruption Act 1997. In that case, quite apart from running counter cases like P*P v. Sandra Margaret Birch,* and *PP v. Toh Ah Keat,* one section in an Act (ie, s. 27 of the Evidence Act 1950) would be held subject to another section in a different Act (eg, s. 113 of the Criminal Procedure Code, and provisions to the like effect in other Acts). Having regard to the wordings of those provisions in other enactments, which provisions bear no reference to s. 27 of the Evidence Act 1950, it would be beyond the function and outside the province of the court so to interpret. Moreover, in *Chandrasekaran & Ors v. PP* [1971] 1 MLJ 153 at p. 158, Raja Azlan Shah J (as he then was) has attributed the admissibility of s. 27 information in evidence to 'the express intention of the legislature', despite its apparent incompatibility with s. 24 of the Evidence Act 1950. (The passage is also quoted in the earlier part of this judgment). Yong Pung How CJ (Singapore) in *PP v. Chin Moi Moi* [1995] 1 SLR 297 at p 304 adopted the passage which was accepted by our Supreme Court in *Wai Chan Leong v. PP*, and said that this would also represent the position in Singapore. If it were indeed the intention of the legislature that s. 27 is an independent section – ie that so long as the evidence constitutes 'information' under s. 27 relating to facts thereby discovered, it is admissible without the necessity of making reference to s. 24 of the same Act, or s. 113 of the Criminal Procedure Code *(PP v. Sandra Margaret Birch; PP v. Toh Ah Keat)* or sections with similar effect in other enactments – then all the more reason that any change to clarify the grey area in the law must be left to the legislature.

We are not unaware of the desirability of protecting accused persons against any possible misuse of power by overzealous police personnel whilst under police custody. As Abdul Hamid Omar LP observed in *Pang Chee Meng v. PP* [1992] 1 MLJ 137 at p 141:

> … we are firmly of the view that in invoking s. 27, the courts should be very vigilant to ensure the credibility of evidence by the police personnel in respect of this section, which is so vulnerable to abuse.

Indeed, we are in complete agreement, as a matter of policy, with the view expressed in the judgment of this court in *Md Desa*, of the desirability as to the voluntariness of s. 27 information. However, due to the lack of language-nexus between s. 27 on the one hand and s. 24 and comparable provisions in other enactments on the other hand, the apparent intention of the legislature, and the long line of past decisions of our courts not a few of which were from eminent members of the appellate and the highest courts, any departure from the entrenched judicial interpretation laid down in the above quoted and other numerous cases would be a policy decision and should, in our view, be left to the legislature …

Fairness requires fair trial which, in turn, needs fair procedure. Fair process requires that the legitimate interests of both the prosecution and the defence are adequately provided for. While the police ought to be given a reasonable opportunity to question suspects and accused persons, in its investigation, the accused must also be reasonably protected from the danger of extraction of unreliable statements and of statements (even if reliable) by some improper means. Evidence obtained in an oppressive manner by force or against the wishes of an accused person or by trick or by conduct of which the police ought not to take advantage, would operate unfairly against the accused and should in the discretion of the court be rejected for admission. The court should ensure that the standards of propriety in obtaining s. 27 information are scrupulously followed in the police station.

[30] Hence in relation to admission of information under s. 27 it is a matter of discretion for the trial judge 'to exclude evidence which is prejudicial to an accused even though the said evidence may be technically admissible. Evidence obtained in an oppressive manner by force or against the wishes of an accused person or by trick or by conduct of which the police ought not to take advantage, would operate unfairly against the accused and should in the discretion of the court be rejected for admission'.

[31] In the present appeals we note from the evidence recorded that at most the defence only denied that the appellants gave the information to PW10 who maintained in his testimony that they did. It was therefore an issue of who should be believed particularly in respect of the second appellant. The learned trial judge accepted the evidence of PW10. Further, in these instant appeals there was hardly any evidence adduced to indicate that admitting the information would operate unfairly and prejudicial to the appellants in which the trial judge would have been obliged to exercise his discretion to exclude such information. In fact we note that from the submission before the learned trial judge it was not urged upon him to exercise his discretion to exclude such information.

[32] As regards the assertion that the first appellant was assaulted and had bruises, the evidence as recorded did not indicate that the information was extracted under such circumstances so as to warrant the learned trial judge to exercise his discretion. In fact other than exh. D28 there was no evidence adduced to indicate that the bruises on the chest and abdomen of the first appellant were the result of assault by the police during interrogation. It was merely a conjecture.

[33] Accordingly we too find no substance in this Issue ii.

Issue iii:

Proof Of Common Intention

[34] Learned counsel for the appellant submitted that it was wrong for the learned trial judge to find that common intention was established when the evidence of PW7 should not have been believed due to its poor quality. And he went on to say that even the recovery of exh. P18(a) and exh. P19(a) could not support the element of common intention since there was also no credible evidence relating to the information under s. 27 of the Evidence Act.

[35] In response the learned deputy argued that based on the evidence of PW7 in that he saw both the appellants with two others chasing the deceased the issue of common intention was well established. The information given under s. 27 by the appellants *albeit* separately was also referred to as supporting the finding of common intention.

[36] The crucial ingredient to prove common intention is the existence of pre-concert or pre-planning which 'may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence.' In *Sabarudin bin Non & Ors v. Public Prosecutor (supra)* this court dealt with proof of common intention succinctly at p. 482:

> To deal with the criminal liability of the second and third accused, it is necessary first to quote from two recent authorities to remind ourselves of the law governing s. 34. In *Suresh v. State of Uttar Pradesh* AIR [2001] SC 1344, Sethi J speaking for himself and Agrawal J said:
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> > Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the common sense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gain saying that a common intention pre-supposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. Such a pre-concert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on a spur of moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. (emphasis added.)
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> In *Hari Ram v. State of Uttar Pradesh* [2004] 3 LRI 523 (SC) which was decided by the Indian Supreme Court in August 2004, Arijit Pasayat J said:
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> > Under the provisions of s. 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in s. 34, when an accused is convicted under s. 302 read with s. 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in

A which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in *Ch Pulla Reddy & Ors v. State of Andhra Pradesh* AIR [1993] SC 1899, s. 34 is applicable even if no injury has been caused by the particular accused himself. For applying s. 34 it is not necessary to show some overt act on the part of the accused.

[37] We have no reason to differ from the view expressed in that case. And bearing in mind the test and that common intention being a question of fact, we have examined the approach adopted and the evidence relied upon by the learned trial judge to determine the issue. In our view there was no misdirection on his part. The learned judge referred to the evidence of PW7 in that he saw the appellants with two others chasing the deceased and the recovery of the items belonging to the deceased through the information given by the appellants separately and at different time. There is therefore no merit in this issue.

Issue v:

Defence Of Alibi And The Defence Of The Second Appellant

[38] Learned counsel for the appellants briefly submitted that the alibi of the first appellant was reasonable and legitimate which should have cast reasonable doubt to the case for the prosecution.

[39] Having critically examined the reasons given by the learned trial judge we are in complete agreement with his conclusion that the defence of alibi of the first appellant should be rejected. As found by the trial judge none of the evidence of the witnesses called to support the alibi of the first appellant came close to account for the movement of the first appellant after the mahjong session ended at midnight on 7 October 1998. Those in the house where the first appellant was staying at that time testified that they went to bed after the game. And bearing in mind that it would take only an hour to reach the place of incident from the house where the first appellant was staying at that time there was more than sufficient time to travel since the offence took place at around 4am on 8 October 1998.

[40] In respect of the defence of the second appellant it was contended by his learned counsel that his conviction was wholly dependent on the testimony of PW7 whose evidence should not have been believed.

[41] In view of our concurrence with the finding of the trial judge on the evidence of PW7 we do not think there is any merit in the contention advanced for the second appellant. Further, upon examination of the evidence of the second appellant we find it to be nothing more than a bare denial of his involvement in the commission of the offence. And in the process of making his denial the second appellant contradicted the evidence of some of the witnesses called by the first appellant and the prosecution. His denial of knowing the house where the first appellant was staying at that time was contradicted by DW3 (Lew Soo Chan).

[42] The second appellant also claimed that he only came once to the place of work of the first appellant. But PW7 contradicted him by saying that he saw the second appellant several times coming to his place to meet the first appellant.

[43] Thus there was no basis to say that the bare denial by the second appellant had raised reasonable doubt in the prosecution's case.

[44] The learned trial judge was therefore correct when he found that the defence had not raised any reasonable doubt in the prosecution's case and that the prosecution had proved its case beyond reasonable doubt that the appellants were guilty as per charge.

[45] Accordingly for the above reasons we dismissed both the appeals of the appellants against their respective convictions and sentences.